No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1941

MERION CRICKET CLUB, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 51–52) is not reported. The opinions of the Circuit Court of Appeals (R. 54–61) are reported in 119 F. (2d) 578.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 28, 1941 (R. 61). The petition for a writ of certiorari was filed May 12, 1941, and was granted October 13, 1941. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether annual fees paid by members of the Merion Cricket Club for the privilege of using its golf facilities constitute "dues or membership fees" subject to the tax imposed by Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations will be found in the appendix, *infra*, pp. 13–16.

STATEMENT

During the period from July 1, 1931, to June 30, 1935, the Merion Cricket Club paid to the Collectors of Internal Revenue then in office amounts allegedly totaling $18,690.29[1] as taxes on the annual golf fees received from its members. The taxes were said to amount to ten percent of such fees, and were collected as "dues or membership fees" under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928. (R. 3, 5.)

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[1] This is the amount stated in the complaint. However, a footnote indicates that this figure should be amended to read $18,048.62. It was stipulated at the trial that the computation of the exact amount to be refunded would not be made unless the right of the petitioner to any refund was ultimately sustained (R. 7–8).

The membership of the Club was divided into ten classifications (R. 10–14); only Proprietary Members (R. 10), Life Members (R. 11), and Honorary Members (R. 14) were not required to pay regular dues (R. 17).[2] Honorary Members had the privilege of using the golf courses merely by virtue of their status as members (R. 14); the only dues-paying members exempted from the payment of annual golf fees were the owners of $1,000 of the stock of the Merion Cricket Club Golf Association (R. 15). All other members[3] who wished to play golf, including Proprietary Members, who owned stock in the company which held title to the land occupied by the Club, and Life Members, were required to pay, "in addition to the other dues or sums for which they are annually liable, further fees for the privilege of playing golf" (R. 10–12, 15, 32). Members electing to play golf continued to be liable for the succeeding year unless they gave notice of withdrawal before the end of the year (R. 15, 16). As in the case of all dues, golf fees were payable on the first of January and the first of July, and persons admitted to golf privileges or membership after July 1 in any year were

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[2] Whether Army and Navy Members were required to pay regular dues is not entirely clear. Compare R. 14 with R. 17.

[3] Persons belonging to the class known as "Playing Members" were not allowed golf privileges (R. 39). "Women having the privileges of the Club" could acquire the privilege of using the golf facilities upon payment of the annual golf fees (R. 15).

entitled to remission of one-half of the annual fees or dues (R. 17). A golf player was not entitled to a proportionate refund if he stopped using the golf facilities during the year (R. 45).[4]

The golf fees[5] were set forth in Article II of the Club's bylaws (R. 16–19). This article also listed the dues to be paid by the members in the various classifications and by women having the privileges of the Club (R. 17). Those desiring to use the golf facilities were required to pay a golf entrance fee of $100 upon admission to this privilege[6] (R. 16). The annual golf fees ranged from $30 for persons under 21 years of age to $110 for men 21 years of age and over (R. 17); the amount of the fee was not dependent upon the class of membership to which the golf player belonged (R. 14–15). Payment of the annual golf fees entitled members to use the golf facilities as often as they desired without further charge. They could permit their wives and guests to use the golf course, in their company, not more than four times in a

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[4] Between 1921 and 1932, when there was a large waiting list for golf privileges, the Club by resolution adopted a policy of permitting golf players to withdraw during the year and to receive a pro rata refund if another member was ready to fill his place (R. 44). This policy was abandoned by resolution adopted February 24, 1932 (R. 44–45).

[5] Until 1929, the golf fees were designated as golf "dues" in the bylaws (R. 19, 44).

[6] Persons who were members of the Club on December 1, 1923, and who had remained members continuously until the date of obtaining golf privileges were exempted from payment of the golf entrance fees (R. 16–17). Whether or not the entrance fee is subject to the tax is not in issue here.

year without paying a further fee. In addition, they could request the occasional issuance of a card entitling a guest residing more than 25 miles from the club to use the facilities for ten days. (R. 18.)

The number of members who could obtain annual golf privileges was limited in the bylaws to 540 or such greater number as the Board of Government might prescribe from time to time[7] (R. 14). When the quota of those admitted to golf privileges was filled, members on the waiting list for admission to such privileges could use the golf courses by payment of daily green fees amounting to $3 and $5 per day (R. 19). Thus, even members entitled to "all the privileges of the Club" paid additional fees for golfing privileges and for the use of certain other facilities (R. 39). The use of a billiard table, squash court or ballroom could be obtained by payment of a fixed charge for each use (R. 35–36).

After a claim for refund of the amounts alleged to have been paid to the Club to cover the taxes on the annual golf fees had been duly filed and rejected (R. 3), the Club on its own behalf and on behalf of its members[8] instituted suit against the United

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[7] Persons who were members of the Club on December 7, 1912, were not subject to this restriction. Playing, Active and Junior Members and women were permitted to exercise golf privileges only in such numbers and on such terms as the Board of Government might prescribe. (R. 14–15.)

[8] Although the record does not show it, the Club filed with the Bureau of Internal Revenue powers of attorney executed by the members on whose behalf the suit is brought, in accordance with Article 54 of Treasury Regulations 43 (revised June, 1932) promulgated under the Revenue Act of 1926, as amended by Revenue Acts of 1928 and 1932.

States for the recovery of the total amount claimed to have been paid (R. 3).[9] The District Court entered judgment for the United States (R. 53). An appeal was taken, and the Circuit Court of Appeals for the Third Circuit affirmed the judgment of the District Court (R. 61).

SUMMARY OF ARGUMENT

Since the Revenue Act of October 3, 1917, a federal excise tax has been imposed on "dues or membership fees" paid to any social or athletic club. Except for the general provision in the 1928 amendment to the Revenue Act of 1926 that "the term 'dues' includes any assessment irrespective of the purpose for which made," the terms "dues or membership fees" have never been defined by statute. Earlier regulations, however, had specified that "dues or membership fees" included extra payments made by club members when by these payments the members or their families acquired the right to the repeated use of club facilities over a period of time.

Those courts which have passed upon the issue of what are "dues or membership fees" have been in substantial disagreement in respect of both results and applicable tests. But a recognition of the basic nature of club operations furnishes a working test for identifying payments which should be in-

[9] An earlier suit by an individual member of the Club, involving the same questions as in the instant case, resulted in judgment against the member (R. 6). *Hardt* v. *McLaughlin*, 25 F. Supp. 684 (E. D. Pa.).

cluded within the statutory terms. In general, any payment made by a club member for the right to the repeated and general use over a period of time of a common facility of the club should be considered to be an amount paid as "dues or membership fees," if the amount of payment is not fixed by each occasion of actual use but represents an apportionment of the cost of maintaining and operating that common facility. Under this general definition, the disputed payments in the instant case were taxable as "dues or membership fees."

ARGUMENT

The issue in this case is whether the annual fees paid by some of the members of the Merion Cricket Club for the privilege of using the Club's golf facilities are taxable as "dues or membership fees" under Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, appendix, *infra*, pp. 13–14. The question is in all material respects identical with that presented in *White* v. *Winchester Country Club*, No. 63, present Term. The position of the Government is presented at length in the Brief for the petitioners in that case, and the Court is respectfully referred to that brief for the historical and theoretical bases of the argument that the fees involved in both cases should be held taxable under the statute.

Although the systems of charging for admission to golf privileges in the two clubs differed slightly, the reasoning in the brief in the *Winchester Coun-*

try Club case is clearly applicable to the facts of this case.[10]

Both clubs permitted the members to use the golf facilities only upon payment of extra dues or fees. In both cases the payments entitled the members to make repeated and general use over a period of time of a common facility of the clubs, and the amount in no way depended on the number of occasions of actual use. Like the dues paid for the privilege of admission to the clubs as a member, these fees represented an apportionment of the cost of maintaining and operating one of the clubs' com-

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[10] The confusion in the bylaws between dues admitted to be taxable and fees for "privileges" claimed to be tax-free which marked the *Winchester* case (see petitioner's briefs, pp. 17–19) is, perhaps, less apparent in the instant case. But some confusion persists. See *infra*, pp. 9–10. And in the instant case, those with golf privileges were known as "golf members" (R. 38). Thus even if the test of applicability of charges to "all members of each particular class of members" were utilized, the golf fees in the instant case should realistically be subject to the tax. Cf. *Weld* v. *Nichols*, 9. F. (2d) 977 (Mass.); *Hardt* v. *McLaughlin*, 25 F. Supp. 684 (E. D. Pa.); *Baltimore Country Club* v. *United States*, 7 F. Supp. 607 (Md.).

And, indeed, in contrast to the *Winchester* case (see petitioner's brief, p. 5, and the concurring opinion in the instant case (R. 58–59)), the payments here in controversy would be taxable even under the rule, which we do not contend should be applied, which hinges taxability on whether privileges can be dropped by giving notice *before* or *after* the beginning of the year. Compare *Hardt* v. *McLaughlin*, *supra*, with *Philadelphia Cricket Club* v. *United States*, 30 F. Supp. 141 (E. D. Pa.).

mon facilities.[11] The golf fees, thus, are clearly different in kind from the payments made by the club members of forty cents for the use of a squash court for forty minutes, or sixty cents an hour for the use of a billiard table (R. 36). In these cases, it is plain that the amount of payment is fixed by each occasion of actual use.

The peculiar organization of the classes of membership of the petitioner herein adds force to the Commissioner's position. The membership of the Club is divided into ten classifications.[12] Each class carries with it slightly different privileges and calls for payment of correspondingly different annual dues. For example, a Senior Member pays annual dues of $100 (R. 17) and is entitled to "all the privileges of the Club", but may not obtain cards of admission for the female members of his immediate family (R. 12). Family Members, paying annual dues of $120 (R. 17), also have all the regular privileges and may in addition obtain cards of

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[11] The President of the Merion Cricket Club testified that a yearly fee is fixed for golf because a golf course is a "continuing source of cost"; the golf courses must be maintained "in good order all the year around, and for that reason we don't care to have a man give it up" (R. 39–40).

[12] Petitioner asserts (Br. 39) that liability for membership dues differ from liability for golf fees in that liability for the latter can be terminated at will, while no transfer from one class of membership to another is permitted where the member's dues will be decreased. But there is no showing in the record that a member cannot pass to a lower class just as a golf member can drop his golf privileges.

admission for the female members of their immediate families (R. 12). A Senior Member may become a Family Member merely by payment of the additional $20 annual dues (R. 12). There is no claim that this additional sum paid by a Senior Member for the enlarged privileges accompanying his entry into Family membership is not properly taxed as "dues or membership fees". No logical distinction for tax purposes can be drawn between this payment and the payment of an extra $110 which the same member must pay for the special privilege of using the golf facilities for a year. In both cases the quantum of privileges is the measure of the charges to be paid. Both payments serve the purpose of enlarging for a year the member's opportunity to enjoy the Club's services, and mere differences in nomenclature should not alter their equal liability to taxation under the statute. Cf. *United States* v. *Anderson*, 108 F. (2d) 475 (C. C. A. 7), certiorari denied, 309 U. S. 688.

Petitioner seems to contend (Br. 16–27), however, that the Commissioner and the Government are bound by a construction of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, which would exempt the instant golf fees from tax, because in 1926, there were deleted from the Treasury Regulations provisions expressly covering such fees, and Congress reenacted Section 501 in 1928. But these

events at most left the situation ambiguous. Petitioners depend on the negative fact of the absence of the earlier regulations, for no new regulation was promulgated which exempted such payments as are here in controversy. Nor was the administrative practice in respect of such payments consistent. Until 1926, immediately after *Weld* v. *Nichols*, 9 F. (2d) 977 (Mass.) was decided, such payments were administratively held to be subject to the tax (R. 20–21). From 1926 to 1930, no tax was claimed against such payments, but following the decision in *Foran* v. *McLaughlin*, 59 F. (2d) 158 (C. C. A. 9), certiorari denied, 287 U. S. 637, payments for golf privileges such as those involved in the instant case were again, and have been continuously since, held by the Commissioner to be subject to the tax (R. 21). Plainly there was not here such a consistent administrative practice and construction as to be binding. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 280; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16. And in any event, it is clear that the limited administrative practice which exempted golf fees was to conform to the apparent compulsions of the *Weld* case; the Commissioner cannot, then, be deemed to have bound himself by the change in 1926. *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Helvering* v. *Hallock*, 309 U. S. 106, 121.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

J. LOUIS MONARCH,
Acting Assistant Attorney General.

MICHAEL H. CARDOZO, IV,
Special Assistant to the Attorney General.

RICHARD S. SALANT,
Attorney.

DECEMBER, 1941.

APPENDIX

Revenue Act of 1928, 45 Stat. 791:

SEC. 413. CLUB DUES TAX.

(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assess-

ments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned." (U. S. C., Title 26, Secs. 950–952.)

Treasury Regulations 43 (1928 Rev.) (Part II):[13]

ART. 40. *Dues or membership fees.*—The Revenue Act of 1928 imposes a tax of 10 per cent on any amount paid as dues or membership fees, including all assessments (and also including penalties incurred by failure to pay promptly), to any club which is within the terms of the act: *Provided*, That the dues or fees, including all assessments (but not including penalties incurred by failure to pay promptly), of an "active resident annual member" of such club are in excess of $25 per year. "An active resident annual member" is a member who is neither a life nor a nonresident member, but who, in other respects, enjoys full club privileges, as distinguished from the restricted privileges enjoyed by a person holding an associte or other partial membership.

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[13] Article 40 of the 1932 revision of Treasury Regulations 43 is identical with the 1928 revision except that in the first sentence the words "Section 501" are substituted for "The Revenue Act of 1928."

The term "dues" is defined by the act as including any assessment, irrespective of the purpose for which made. Therefore, assessments for capital expenditures will not be exempt from tax when paid on and after June 29, 1928, provided the sum of the assessments and dues to be paid by active resident annual members exceeds $25 per year.

Thus in the case of a club or organization the regular dues or membership fees of which are less than $25 a year, but which levies an assessment on its active resident annual members, if the regular dues or membership fees, plus the assessment, exceed $25 per year, the tax is applicable. The tax would likewise apply in the case of a club or organization which collects no regular dues or membership fees but meets its expenses by levying assessments on its members as funds are required, provided, of course, the assessments aggregate more than $25 per year for members who enjoy the full privileges of the club or organization.

Where the dues or membership fees, including assessments, determined in the manner herein outlined, of an active resident annual member are in excess of $25 per year, dues or membership fees paid by other classes of members, whether or not they are in excess of $25 per year, are subject to the tax. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the act, and therefore, not taxable.

Examples.— * * *

* * * * *

(5) A certain golf club has two classes of members. Class A members pay $40 per

year dues and are entitled to the full privileges of the club, including the use of the golf course. Class B members pay $25 per year dues and are entitled to the privileges of the clubhouse, but do not enjoy the privilege of the golf course. The total dues of $40 paid by class A members are subject to tax, and, since the dues of such members are in excess of $25 per year, the dues of $25 paid by class B members are also subject to tax.

(6) A certain golf club charges a "green" fee of $1 for each guest that uses the course. Such a fee is not paid "as dues or membership fees," and is, therefore, not taxable as such.

* * * * *

(8) A tennis club in which the annual dues are $25 levies an assessment of $2 per year on each member to cover cost of tennis balls. The dues, fees, and such assessments paid by members of this club are taxable.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941

SUPREME COURT OF THE UNITED STATES.

No. 83.—October Term, 1941.

Merion Cricket Club, Petitioner.
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 12, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

The question in this case—whether amounts paid by members of the Merion Cricket Club during the period from July 1, 1931, to June 30, 1935, for golf privileges, constituted payments as "dues or membership fees" subject to the tax imposed by § 501 of the Revenue Act of 1926, 44 Stat. 9, 92, as amended by Section 413 of the Revenue Act of 1928, 45 Stat. 791, 864—does not differ in substance from that decided this day in *White* v. *Winchester Country Club*, *ante*, p. —.

With certain exceptions, a member of the Merion Cricket Club could obtain annual golf privileges only by payment of a fee, which varied in amount according to his age and status. The fee was payable in two equal installments, one on the first of January, and the other on the first of July. A member admitted to golf privileges after the latter date was entitled to remission of one-half of the annual fees, but if one stopped using the golf facilities during the year there was no proportionate refund. If a member elected to play golf he continued to be liable for the succeeding year unless he gave notice of withdrawal before the end of the year. Members who paid the annual golf fees were entitled to use the golf facilities as often as they desired without further charge, and could on occasion obtain golf privileges for their wives and guests.

After a claim for refund of the amounts alleged to have been paid as taxes on the annual golf fees had been duly filed and rejected, the Club on its own behalf and on behalf of its members sued the United States in the United States District Court for the Eastern District of Pennsylvania to recover them. The District Court

entered a judgment for the United States which was affirmed on appeal to the Circuit Court of Appeals for the Third Circuit. 119 F. 2d 578. Certiorari was granted in this case and in *White* v. *Winchester Country Club, ante*, p. —, because of an asserted conflict between the decisions below. 313 U. S. 555; 314 U. S. —.

In this case, as in *White* v. *Winchester Country Club, supra*, we hold that amounts paid were paid as "dues or membership fees," since they were for rights to the repeated and general use of a common club facility for an appreciable period of time, and were not fixed by each occasion of actual use.

The decision below is therefore

Affirmed.

Mr. Justice ROBERTS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.